IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-955

W. C. SPOMER, STATES ATTORNEY OF ALEXANDER COUNTY, ILLINOIS,

Petitioner,

vs.

EZELL LITTLETON, ET. AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

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OPINIONS BELOW.

The Opinion of the Court of Appeals for the Seventh Circuit is reported at 468 F. 2d 389 and appears in full in the Appendix to the Petition for Certiorari (A1). The Opinion of the District Court for the Eastern District of Illinois is not reported and appears in full in the Appendix to the Petition for Certiorari (A1).

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 6, 1972. This Court's jurisdiction was invoked under 28 U. S. C. § 1254(1). The Petition for Writ of Certiorari was filed on January 3, 1973, and granted on April 2, 1973.

CONSTITUTIONAL PROVISIONS.

Article II, Section 3 of the Constitution of the United States provides in pertinent part:

> "[the President] shall take care that the laws [shall] be faithfully executed."

STATUTORY PROVISIONS.

Sections 1981, 1982, 1983, and 1985 of 42 U. S. C. appear in full in the Appendix to the Petition for Certiorari (A1), pp. 61-63.

QUESTIONS PRESENTED.

1. Whether an injunction compelling a state prosecutor to prosecute is a remedy under the Civil Rights Act of 1871?
2. Whether a state prosecutor is immune from an injunction compelling him to prosecute?
3. Whether respondents have available civil remedies and access to criminal process which are as adequate and more preferable to the unduly burdensome injunction against the state prosecutor?
4. Whether the conclusory complaint drafted by attorneys is insufficient to state a cause of action against a state prosecutor in view of the abuse potential inherent in such suits and the very minimal possibility of respondents prevailing?

STATEMENT OF THE CASE.

This case arises from an amended complaint bringing a civil rights class action filed in the United States District Court for the Eastern District of Illinois. Nineteen named plaintiffs, all but two of whom are black citizens of Cairo and Alexander County, Illinois, seek damages and injunctive relief against the State's Attorney of Alexander County, his investigator, and a Magistrate and Associate Circuit Judge of the Circuit Court for Alexander County. The action, premised on 42 U. S. C. Sec. 1981, 1982, 1983 and 1985, sought damages and injunctive relief against the named functionaries of Alexander County for claimed deprivations, under color of law, custom, and usage, of various rights and immunities secured to the plaintiffs and their class under the Constitution and the above named sections of Title 42.

During the past few years Cairo, Illinois has been an area of major civil rights activity by the black citizens seeking to alleviate alleged racial discrimination. Part of the civil rights activities involved an economic boycott of local merchants who were alleged to have engaged in racially discriminatory practices. As a result of the economic boycott and general civil rights activities in Cairo the investigative, prosecutorial and judicial officials of Alexander County were required to act. It is on the basis of the resultant actions by the local officials that the specific allegations against the Alexander County functionaries rest.

The State's Attorney is alleged to engage in a pattern of discriminatory conduct in that he refuses to allow blacks to give evidence of crimes committed by white citizens

against black citizens of Cairo, refuses to initiate criminal proceedings against whites who batter blacks, employs the grand jury as a means of delaying and defeating the complaints brought by blacks, purposely prosecutes white offenders inadequately, and discriminatorily makes bond, sentence and charging recommendations. Respondents sought injunctive relief prohibiting the State's Attorney from depriving them of their constitutional rights and requiring the State's Attorney to file periodic reports to the district court on the disposition of complaints filed by respondents and members of the class (Appendix to brief, p. 24).

The named judges of Alexander County are alleged to set bond in criminal cases in a discriminatory manner and sentence black defendants to longer criminal terms and imposes harsher conditions than they do for white persons charged with similar offenses. The district court, after allowing the filing of an amended complaint, entered a Memorandum and Order dismissing the complaints for want of jurisdiction and the immunity of the officials for their judicial and quasi-judicial actions. The district court reasoned that in seeking to enjoin the elected officials of Alexander County for their discretionary acts the plaintiffs attempt to cause the federal court to substitute its judgment for that of the duly elected local officials—an action beyond the jurisdiction of the court. The lower court also held that the doctrine of judicial immunity was applicable to the named judges because the actions alleged in the complaint were taken in the course of the judicial duties. Similarly, the court held that the prosecutor and his investigator were also immune from damage claims arising out of their judicial or quasi-judicial acts.

The Court of Appeals reversed and remanded the case to the district court on the basis that the action was improperly dismissed. The Court of Appeals found that

jurisdiction under 42 U. S. C. Sec. 1981 and 1983 did exist and more importantly, the reviewing court considered at length the history, nature, and scope of judicial immunity. The court analyzed the recent decisions on the scope of injunctive relief under Section 1983 and found the "exceptional circumstances" for federal court intervention by injunction of state court criminal prosecutions.

The court then considered the limitations on the concept of prosecutorial immunity and concluded that investigative activities by the prosecutor were not one of the quasi-judicial duties for which he had immunity. Though the court did not hold that the actions of Alexander County State's Attorney complained of in the pleadings were "investigative" in nature, it specifically directed the district court to consider the limitations on the prosecutor's immunity when performing investigative functions. The Court of Appeals concluded by holding that quasi-judicial immunity does not extend complete freedom from injunction to the prosecutor and that the allegations made in the complaint, if established, could merit injunctive relief.

The court, noting that its holding created a case of first impression as to the type of relief approved, volunteered guidelines as to what type of remedy might be imposed, suggesting that periodic reports containing data on bail, sentencing and dispositions of complaints be made by the local officials to the federal district court.

SUMMARY OF ARGUMENT.

The effect of the injunction authorized by the Seventh Circuit will be to compell the state prosecutor to initiate criminal proceedings on complaints filed by respondents or members of respondents class.

The congressional debates surrounding the enactment of the Civil Rights Act of 1871, as well as this Court's interpretation of the Act, make it clear that an injunction compelling a state prosecutor to prosecute is not a remedy under the Civil Rights Act of 1871.

Throughout the entire history of American criminal jurisprudence, the prosecutor, in the exercise of his executive discretion, has remained immune from judicial control. In authorizing this injunction against the state prosecutor, the Seventh Circuit ignored the fact that the prosecutor's role in the criminal justice system, the nature of and need for prosecutorial discretion, and the compelling need for such discretion to remain free from judicial control dictates that the state prosecutor continue to remain immune from the type of injunction authorized by the Court.

Respondents have available civil remedies and access to criminal process at law which are as adequate and more preferable to the unprecedented remedy authorized by the Seventh Circuit. Notwithstanding these remedies, the Court authorized a remedy which would require federal judges to act as state prosecutors, seriously disrupt the historic federal-state relationship in the administration of criminal justice, and unduly burden both the state prosecutor and the federal courts. Such a choice of remedy should not be affirmed by this Court.

The Seventh Circuit improperly held that respondents' conclusory, unsupported complaint sufficiently alleged a

cause of action against the state prosecutor. The potential for undue burden and abuse inherent in the present suit, and the improbability of respondents prevailing at trial requires that respondents' conclusory allegations be deemed insufficient to state a cause of action against the state prosecutor.

ARGUMENT.

A.

The Seventh Circuit held that the state prosecutor was subject to the injunctive relief sought by the respondents.[1] The Court of Appeals suggested that "An initial decree might set out the general tone of rights to be protected and require only periodic reports of various types of aggregate data on actions on bail and sentencing and dispositions of complaints . . ." The Court expressed ". . . complete confidence in the district court's ability to set up further guides as required and, if necessary, to consider *individual decisions.*"[2] (Emphasis added).

The Court envisioned a general decree prohibiting discrimination against respondents or members of their class. The state prosecutor would then be required to submit to

1. Respondents prayed that the defendant State's Attorney be preliminarily and premanently enjoined from:

   A. Depriving plaintiffs and members of the plaintiff class of their constitutional rights (by refusing to prosecute, permit plaintiffs to give evidence, proceed by information, properly interrogate, adequately prosecute, recommend equal bonds, charge equally), and that defendant be required to submit a monthly report to this Court concerning the nature, status and disposition of any complaint brought to him by plaintiffs or members of their class, or by white persons against plaintiffs or members of their class.

   B. Neglecting his duties of office in failing to interrogate impartially and without discrimination witnesses before a grand jury.

   C. Requesting more severe bond and sentences for plaintiffs and members of their class than for white persons.

   D. Setting more severe charges against plaintiffs and members of their class than against white persons. Amended Complaint, Appendix, p. 24.

2. Littleton v. Berbling, 468 F. 2d 398, 415 (7th Cir. 1972).

the district court periodic reports on his actions, and his "individual decisions" would there be reviewed. If the district court were not satisfied by the prosecutor's decisions, presumably the prosecutor would be held in contempt or he would be compelled by mandatory injunction to "correct" his actions in whatever manner appeared satisfactory to the district court. In either event, the ultimate effect of the original decree, as authorized by the Seventh Circuit, would be to compel the state prosecutor to prosecute complaints filed by respondents or members of their class and to prosecute such complaints in a manner satisfactory to the federal court. In effect, the Seventh Circuit authorized a mandatory injunction compelling a state prosecutor to prosecute and to prosecute in a manner satisfactory to a federal court.[3] Such a remedy is improper for the following reasons.

I.

AN INJUNCTION COMPELLING A STATE PROSECUTOR TO PROSECUTE IS NOT A REMEDY UNDER THE CIVIL RIGHTS ACT OF 1871.

The congressional debates surrounding the enactment of the Civil Rights Act of 1871, as well as this Court's interpretation of the Act, make it clear that an injunction compelling a state prosecutor to prosecute is not a remedy under the Civil Rights Act of 1871.

The congressional debates surrounding the Ku Klux Klan Act of April 20, 1871, ch. 22, 17 Stat. 13[4] evidence the

3. The reference to and reliance upon Peek v. Mitchell, 419 F. 2d 575 (6th Cir. 1970) (. . . "where the court denied a similar affirmative injunction *to require prosecution*") and other references to compelling prosecution in the majority opinion clearly indicate that the Seventh Circuit was aware of the effect of the "general guidelines" it suggested. But the ultimate effect of the authorized injunction was squarely confronted only by Judge Dillin in the dissenting opinion.

4. 42 U. S. C. § 1983 derives from § 1 of this Act and 42 U. S. C. § 1985(3) from § 2 of the Act.

intent to provide federal remedy for deprivations of constitutional rights under color of state law.[5] There was henceforth to be a remedy in *federal court* for federally secured rights. As stated by Representative Lowe:

> "[The] records of the [state] tribunals are searched in vain for evidence of effective redress [of federally secured rights] . . . What less than this [the Civil Rights Act of 1871] will afford an adequate remedy? *The Federal Government cannot serve a writ of mandamus upon State Executives or upon State Courts to compel them to protect the rights, privileges and immunities of citizens* . . . The case has arisen when the Federal Government must resort to *its own agencies to carry its own authority into execution.* Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired.[6] (Emphasis added.)

A similar view was expressed by Senator Osborn: "If the State Courts has proven themselves to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate . . . We are driven by existing facts to *provide for the several states* . . . what they have been unable to fully provide for themselves; i.e. *full and complete administration of justice in the courts.* And courts with reference to which we legislate *must be the United States Courts.*"[7] (Emphasis added.) And as clarified by Senator Thurman:

> "It authorizes any person who is deprived of any right,

5. As Representative Shellabarger stated: The Civil Rights Act of 1871 "not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of state law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1971). See also Monroe v. Pape, 365 U. S. 167 (1961); Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676.

6. Cong. Globe, 42d Cong. 1st Sess. 374-376 (1871).

7. *Id.*, at 653.

> privilege or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal Courts, . . . by this section jurisdiction of that civil action is given to the *Federal courts instead of its being prosecuted as now in the courts of the States.*"[8] (Emphasis added.)

The remedy authorized under the Act was to be rendered directly by the federal courts in the course of a civil action holding liable those persons acting under color of state law who had deprived others of their federal rights. That the federal courts were to compel state executives or state courts to provide a remedy was neither authorized nor envisioned. It was well understood that state executives and state courts were unable or unwilling to provide appropriate sanctions.[9] Representative Coburn said that:

> "The United States courts are further above mere local influences than the county courts; their judges can act with more independence; cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudice or bad passions or terror more easily."[10]

The Act was not designed to authorize direct federal compulsion of state executives to prosecute violators of civil rights in state courts. Congress had provided for such criminal prosecution in the *federal courts* by previously enacting 18 U. S. C. §§ 241, 242 (Enforcement Act of 1870)[11]

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8. *Id.*, App. 216.

9. See the message sent to Congress by President Grant, *id.*, p. 224; (Mr. Lowe) p. 374; (Mr. Beatty), p. 428; (Sen. Osborn) p. 653.

10. *Id.*, p. 460.

11. Section 241 is a conspiracy statute. It reads as follows:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

which were the criminal analogues to the civil remedies provided in the Ku Klux Klan Act (42 U. S. C. §§ 1983, 1985 (3)).

Interpretation by this Court of the Act and the debates surrounding the Act supports this view. In *Monroe* v. *Pape*, this Court recognized: "It is abundantly clear that one reason the legislation was passed was to afford a federal right in the federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced . . ."[12] And in *Mitchum* v. *Foster*, this Court stated:

> "This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect

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> "If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
>
> "They shall be fined not more than $5000 or imprisoned not more than ten years, or both."

Section 242 first came into law as § 2 of the Civil Rights Act, Act of April 9, 1866, 16 Stat. 140, 144. After passage of the Fourteenth Amendment, this provision was re-enacted by § 18 of the Enforcement Act of 1870. As originally enacted this section provided:

> "§ 2. *And be it further enacted*, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine not exceeding one year, or both, in the discretion of the court."

12. 365 U. S. 167, 180, 81 S. Ct. 473, 481 (1961).

> those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that the failings extended to the state courts . . . The very purpose of § 1983 was to *interpose* the federal courts *between* the States and the people, as guardians of the people's rights—to *protect the people* from unconstitutional action under color of state law . . .[13] (Emphasis added.)

As opposed to standing above the states and mandating state executives to provide protection in state courts, § 1983 was to interpose the federal courts between the states and the people." placing a direct burden on the federal courts and federal authorities to provide relief in individual cases where the states had not done so. While in *Mitchum* this Court authorized injunctive relief under § 1983, only prohibitory injunctive relief against a state court proceeding has been authorized by this Court; never has this Court authorized injunctive relief to compel initiation of a state criminal proceeding because such a federal mandamus is not a remedy under the Civil Rights Act of 1871.

II.

THE STATE PROSECUTOR IS IMMUNE FROM AN INJUNCTION COMPELLING HIM TO PROSECUTE.

The Seventh Circuit held that while the defendant State's Attorney was at least partially immune from suit for damages under the Civil Rights Acts, the State's Attorney was subject to injunctive proscription. The Court reasoned that since—(A) a federal court has the power to enjoin a state prosecutor *from* instituting criminal proceedings;[14] (b) an "... affirmative injunction to require prosecution"[15]

13. 407 U. S. 225, 92 S. Ct. 2151, at 2162 (1972).

14. Ex parte Young, 209 U. S. 123 (1908); Younger v. Harris, 401 U. S. 37 (1971); Mitchum v. Foster, 407 U. S. 225, 92 S. Ct. 2151 (1972).

15. Littleton v. Berbling, 368 F. 2d 389, 411 (1972).

was impliedly authorized by the Sixth Circuit in *Peek* v. *Mitchell*;[16] and (c) plaintiff's remedy at law was inadequate, an injunction to secure ". . . prompt and effective prosecution under the criminal laws"[17] was proper. The Court recognized prosecutorial discretion, but held that "a discretionary action is subject to review and reversal for abuse of discretion."[18] In holding that injunctive relief was proper, and suggesting that "if necessary" the district court should "consider individual decisions" by the enjoined state prosecutor, the Court virtually ignored the role of the prosecutor in the administration of criminal justice, the nature of and necessity for prosecutorial discretion in the initiation of criminal proceedings, the degree to which American courts have consistently preserved such prosecutorial discretion, and the compelling need for such discretion to remain free from judicial control.

The prosecutor stands at a critical point in the American criminal justice system. He functions at the hub of the system, working directly with the police, the courts, the people.[19] The duty of the prosecutor is to "seek justice."[20] Although an advocate operating within an adversary system, he is obliged to protect the innocent as well as convict

16. 419 F. 2d 575 (6th Cir. 1970). The Sixth Circuit noted that "It is . . . apparent that the federal courts must achieve a balance between the protection of individual rights and the freedom of public officials to exercise their necessary expertise in performing their duties . . . and the courts must shield the responsible public officials against any abusive use of the civil rights legislation," and held.

17. *Supra*, note 15, at 412.

18. *Id.*, at 412.

19. See Remarks to the Law Enforcement Assistance Administration Court Specialists Throughout the United States, by Carol S. Vance, President of the National District Attorneys Association, The Prosecutor Vol. 8, No. 6.

20. ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, THE PROSECUTION FUNCTION, Section 1.1(c) (Approved Draft, 1971) [hereinafter cited as ABA STANDARDS].

the guilty, to guard the rights of the accused as well as enforce the rights of the public:[21]

> The prosecutor has a dual role which reflects in a sense the ambivalence of public attitudes on law enforcement and is the source of some difficulties. On the one hand, the prosecutor is the leader of law enforcement in the community. He is expected to participate actively in marshaling society's resources against the threat of crime. When a crisis in the enforcement of criminal law arises in the community, the public press and others clamor for a "war against crime" and he may be drawn into the maelstrom of political controversy by the demand that he "stamp out the criminals." He is called upon to make public statements, to propose legislative reforms, or to direct the energies of the law enforcement machinery of the community. On the other hand, the office demands and on sober thought the public expects, that the prosecutor will respect the rights of persons accused of crime. Our nation began with resistance to oppressive official conduct and our traditions, embodied in the national and state constitutions, demand that the prosecutor accord basic fairness to all persons. Because of the power he wields, we impose on him a special duty to protect the innocent and to safeguard the rights guaranteed to all, including those who may be guilty. The conflicting demands on a prosecutor may exert pressures on him which his sense of fairness as a lawyer rejects. Both his public responsibilities as well as his obligations as a member of the bar require that he be something more than a partisan advocate intent on winning cases.[22]

In this role as quasi-judicial "minister of justice",[23] the American prosecutor exercises a vast amount of discre-

21. ABA Code of Professional Resposibility EC 7-13 (Final Draft, 1969) [hereinafter cited as ABA Code]; United States v. Kline, 221 F. Supp. (D. Minn. 1963).

22. ABA Standards, the Prosecution Function, Introduction, p. 19.

23. See the Commentary to ABA Standards, Prosecution Function, Section 1.1.

tion.[24] The prosecutor's discretion is most pronounced with respect to the initiation and discontinuance of criminal proceedings.[25] Prosecutorial discretionary power in the initiation of criminal proceedings arises not by statute but from the common law.[26] Courts throughout the country

24. Various commentators have advanced the following definitions of "discretion" in this context: "an authority conferred by law to act in certain conditions or situations, in accordance with the official's or the official agencies' own considered judgment and conscience," La Fave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 n.1 (1970); Professor Davis posits that a "public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action," K. DAVIS, DISCRETIONARY JUSTICE 4 (1969) [hereinafter cited as Davis]; See generally Pound, *Discretion, Dispensation and Mitigation; The Problem of the Individual Special Case*, 35 N. Y. U. L. REV. 925 (1960); Baker & DeLong, *The Prosecuting Attorney: The Process of Prosecution*, 26 J. CRIM. L. & CRIM. 647 (1935); Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U. L. REV. 174 (1965).

25. The complaint in the present case is directed against the failures of the prosecutor:

a) to *initiate* criminal proceedings when the victims are members of the plaintiffs' class;

b) to *proceed* on plaintiffs' complaints by complaint and information rather than by grand jury actions;

c) to *interrogate* properly before the grand jury;

d) to *prosecute* adequately cases involving respondents as complainants.

The Seventh Circuit has authorized injunction which would compel the state prosecutor to initiate and prosecute complaints. Considering the nature of the complaint and the Seventh Circuit holding, particular focus here will be made upon the discretion of the prosecutor in the initiation and discontinuance of criminal proceedings. Certainly the prosecutor exercises a vast amount of discretion in the manner of prosecution (i.e., order and examination of witnesses, motions, strategy, etc.) once prosecution has been initiated. The nature of and considerations underlying prosecutorial discretion in initiation and discontinuance decisions apply equally to the prosecutor's discretionary decisions throughout prosecution.

26. At Common Law the prosecuting attorney had absolute control of the criminal prosecution. See United States v. Thompson, 251 U. S. 407, 40 S. Ct. 289 (1920); Confiscation Cases, 7 Wall 454, 19 L. Ed. 196 (1868); United States v. Brokaw, 60 F. Supp. 100 (S. D. Ill. 1945); Fay v. Miller, 183 F. 2d 986 (D. C. Cir. 1950).

have consistently interpreted the common directory statutes[27] so as to permit substantial discretion to abstain from prosecution.[28] The courts have reasoned that the terms of the statutes are not to be viewed as a mandate to act against all possible offenders; that such mechanical enforcement of all criminal law would be undesirable and impractical. Underlying this reasoning is a desire for leniency in par-

27. Most statutes, such as that of Illinois simply provide that the duty of the states attorney:

> shall be (1) to commence and prosecute *all* actions, suits, indictments and prosecutions, civil and criminal, in any court of record in his country, in which the people of the state or county, may be concerned. (emphasis added)
>
> (2) To institute and prosecute all actions and proceedings in favor of or for the use of the state, which may be necessary in the execution of the duties of any state officer.
>
> (12) To attend to and perform any other duty which may, from time to time, be required of him by law. Illinois Revised Statutes, Chapter 14, § 5 (1969).

The federal rules are equally general and indefinite by defining the duties of the district attorney as simply to: "(1) prosecute for all offenses against the United States; (4) . . . unless satisfied in investigation that justice does not require the proceeding," 28 U. S. C. § 547 (1964).

28. *See generally* Annot., 155 A. L. R. 11 (1945):

> The cases passing upon this question seem to be agreed upon the proposition that a duty rests upon a district or prosecuting attorney to prosecute the violators of the criminal laws of the state whom he knows or has reason to believe to be guilty of such violations. (citations omitted). [sic] but that this duty is not absolute but qualified, requiring of him only the exercise of a sound discretion, which permits him to refrain from prosecuting, or having commenced a prosecution, to enter a nolle prosequi, whenever he, in good faith and without corrupt motives or influences, thinks that a prosecution would not serve the best interests of the state, or that, under the circumstances, a conviction could not be had, or that the guilt of the accused is doubtful or not capable of adequate proof.

See also: Nedrud, *The Role of the Prosecutor in Criminal Procedure*, 32 U. M. K. C. L. Rev. 142, at 148 (1964); LaFave, *The Prosecutor's Discretion in the United States*, 18 Am. J. Comp. L. 532 (1970) [hereinafter cited LaFave].

ticular cases,[29] a flexible procedure necessary to effectuate that end, and adherence to the theories of criminal law which are aimed to some degree at societal purposes other than crime prevention.[30] Implicit in the attitude of the courts is a basic recognition that the nature of the decision to prosecute *requires* that it be discretionary with the prosecutor for the decision to prosecute involves a delicate weighing of a myriad of subjective and objective factors:

> [D]iscretionary judgment is the product of the inevitable need for mediation between generally formulated laws and the human values contained in the varieties of particular circumstances in which the law is technically violated.[31]

The President's Commission has suggested several subjective factors that may be weighed in determining whether to decline prosecution:

(1) the seriousness of the crime;

(2) the effect upon the public sense of security and justice if the offender were to be treated without criminal conviction;

(3) the place of the case in effective law enforcement

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29. Two desires are apparent: The first is the need on the part of the public and the courts for personalized justice, "rather than literalistic adherence" to laws. L. MILLER, DOUBLE JEOPARDY AND THE FEDERAL SYSTEM, 118 (1968). See LaFave, *supra*, note 16, at 534 (1970); Silkenat, *Limitations on Prosecutor's Discretionary Power to Initiate Criminal Suits: Movement Toward a New Era*, 5 OTTAWA L. REV. 104, at 107 (1971). The second is the desire by prosecutors that their function not appear to be one of "persecutors". Ploscowe & Spiero, *The Prosecuting Attorney's Office and the Control of Organized Crime*, MANUAL FOR PROSECUTING ATTORNEYS, at 317; F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 187 (1969) [hereinafter cited as F. Miller].

30. Justice Breitel favors lenient discretion, a discretionary power which would "ameliorate or avoid the effective application of the literal criminal code." Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, at 430 (1960) [hereinafter cited as Breitel].

31. Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 HARV. L. REV. 904, at 913 (1969).

policy where deterrent factors may loom large, *e.g.*, tax evasion, white collar crimes, first conviction juvenile offenses;

(4) whether the offender has medical, psychiatric, family, or vocational difficulties;

(5) whether there are agencies in the community capable of dealing with his problem;

(6) whether there is reason to believe that the offender will benefit from and cooperate with a treatment program;

(7) what the impact of criminal charges would be upon the witnesses, the offender, and his family.[32]

Objective considerations include 1) sufficiency of the evidence;[33] 2) witness availability and willingness to co-

32. PRESIDENTS COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT, 25-41 (1967) See also Cates, *Can We Ignore Laws—A Discretion Not to Prosecute*, 14 ALA. L. REV. 1 (1961).

33. The Los Angeles District Attorney compiled the following list of reasons for refraining to file a complaint:

(1) Departmental policy
(2) No Corpus Delecti
  (a) no specific intent
  (b) no criminal act
(3) No connecting evidence
  (a) a statement problem
  (b) witness problem
  (c) physical evidence problem
(4) Insufficient evidence
  (a) facts weak
  (b) evidence not available
  (c) incomplete investigation
  (d) witnesses not available
  (e) evidence inadmissible
    1. illegal detention
    2. fruit of the poisoned tree
    3. search warrant problem
    4. search & seizure problem
    5. warrant of arrest
    6. Miranda plus
(5) Lack of jurisdiction
(6) Statute of limitations

operate; 3) cooperation of the accused in the apprehension of other offenders; 4) strength of the defendants case; 5) possibility for non-criminal disposition.[34] Additionally, a

(7) Offense—misdemeanor
  (a) filed
  (b) referred
(8) Interest of justice.

See Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519, 531 (1969).

34. Consider also the ABA STANDARDS, PROSECUTION FUNCTION, Section 3.8, 3.9:

3.8 Discretion as to non-criminal disposition.

(a) The prosecutor should explore the availability of non-criminal disposition, including programs of rehabilitation, formal or informal, in deciding whether to press criminal charges; especially in the case of a first offender, the nature of the offense may warrant non-criminal disposition.

(b) Prosecutors should be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.

3.9 Discretion in the charging decision.

(a) In addressing himself to the decision whether to charge, the prosecutor should first determine whether there is evidence which would support a conviction.

(b) The prosecutor is not obliged to present all charges which evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence exists which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:

(i) the prosecutor's reasonable doubt that the accused is in fact guilty;
(ii) the extent of the harm caused by the offense;
(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
(iv) possible improper motives of a complainant;
(v) prolonged non-enforcement of a statute, with community acquiescence;
(vi) reluctance of the victim to testify;
(vii) cooperation of the accused in the apprehension or conviction of others;
(viii) availability and likelihood of prosecution by another jurisdiction.

prosecutor's office may informally have a policy not to prosecute certain types of offenses.[35]

The decision to prosecute is necessarily an individualized decision. The facts, crime, victim and defendant vary with each and every case:

> The principle that seems to emerge . . . is that there should be a tolerably consistent pattern in serious offenses within the particular legal system. Conduct that is criminal in the eyes of the law should, where the offenses are comparable, result in prosecution or no prosecution irrespective of the locality. . . . But however strong the tendency may be to secure uniformity, a decision whether to prosecute or not has to be made on the particular facts and circumstances of the particular case.[36]

Discretion is necessary to dispose quickly of the obviously faulty case, to permit early disposition and screening of cases in which the accused is apparently innocent, or for any of the factors listed above, the case would be a waste of time to pursue. Discretion is necessary to allow the prosecutor a choice of weapons sufficiently flexible to cover any

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35. The President's Commission suggests that the following are offenses not likely to be prosecuted:

(1) domestic disturbances;

(2) assaults and petty thefts in which the victim and offender are in a family or social relationship;

(3) statutory rape when both the boy and girl are young;

(4) first offense car thefts, the "joyride";

(5) checks drawn upon insufficient funds;

(6) first offense shoplifting, particularly where restitution is made;

(7) where the criminal acts involve offenders suffering from emotional disorders short of legal insanity;

(8) cases involving annoying or offensive behavior other than a dangerous or serious crime, e.g. drunkeness, disorderly conduct, minor assault, vagrancy, and petty theft.

President's Commission, *supra*, not 19, at 5-8.

36. R. JACKSON, ENFORCING THE LAW, 53-54 (1967).

single course of conduct.[37] Even if criminal laws were drafted with exquisite specification, it would still be necessary for the prosecutor to exercise judgment. Indeed, discretion is forced upon the prosecutor for "... no prosecutor can even investigate all of the cases in which he receives complaints . . . What every prosecutor is practically required to do is select the cases for prosecution and select those which the offense is most flagrant, the public harm the greatest, and the proof the most certain."[38]

The prosecutor's decisions can only be made on a case by case basis. In this regard, his decisions are clearly distinguishable from other common decisions of public officials substantially affecting the public interest, *e.g.* decisions as to who is to have housing, who is to be employed, attend particular schools, utilize public facilities, etc. The prosecutor cannot decide in advance who is to be prosecuted. Each particular case involves the delicate weighing of numerous factors and an evaluation based upon judgment and sound discretion.

The courts have consistently refused to interfere with prosecutorial discretion in making this delicate decision.[39]

37. *See generally* Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L. J. 1 (1932); Comment, *Prosecutorial Discretion—A Re-evaluation of the Prosecutor's Unbridled Discretion and its Potential for Abuse*, 21 DEPAUL L. REV. 485 (1971).

38. PACKER, THE LIMITS OF THE CRIMINAL SANCTION, 290-91 (1968).

39. United States v. Cox, 342 F. 2d 167 (5th Cir. 1965); Powell v. Katzenbach, 359 F. 2d 234, *cert. denied* 88 S. Ct. 1341 D. C. Cir. 1965); United States v. Brokaw, 60 F. Supp. 100 (S. D. Ill. 1945); Moses v. Kennedy, 219 F. Supp. 762 (D. D. C. 1963); United States v. Woody, 2 F. 2d 262 (D. Mont. 1924); Pugach v. Klein, 193 F. Supp. 630 (S. C. N. Y. 1961); Goldberg v. Hoffman, 225 F. 2d 463 (1955); Patten v. Dennis, 134 F. 2d 137 (9th Cir. 1943); Confiscation Cases, 74 U. S. (7 Wall.) 454 (1893).

State Cases: Wilson v. County of Marshall, 257 Ill. App. 220 (1930); People v. Wabash, St. L. & P. Ry., 12 Ill. App. 263 (1883); People v. Newcomer, 284 Ill. App. 315, 120 N. E. 244 (1918); Taliaferro v. Locke, 182 Cal. App. 2d 752, 6 Cal. Rptr.

The courts have repeatedly refused to force a prosecutor to either initiate criminal proceedings,[40] continue criminal proceedings, [41] reinstate a case wherein a *nolle proseque* had been entered,[42] or charge a particular offense,[43] whatever his reasons for acting.[44]

The courts have presented sound reasons for refusing to interfere with prosecutorial discretion. Article II, Section

813 (1960); Bd. of Supervisors v. Simpson, 36 Cal. 2d 671, 227 P. 2d 14 (1951); Wilson v. Sharp, 42 Cal. 675, 268 P. 2d 1062 (1954); Leoni v. Fanelli, 194 Misc. 826, 87 N. Y. S. 2d 850 (Sup. Ct. 1949); Murphy v. Summers, 54 Tex. Crim. 369, 112 S. W. 1070 (1908); Ackerman v. Houston, 45 Ariz. 293, 43 P. 2d 194 (1935); Brack v. Wells, 184 Md. 86, 40 A. 2d 319 (1944); State ex rel. Spencer v. Criminal Court, 214 Ind. 551, 15 N. E. 2d 1020 (1938); Also *see generally* Annot. 155 ALR 11 (1945).

40. United States v. Cox, *id;* Moses v. Kennedy, *id.*, and cases cited therein.

41. Consider Petite v. United States, 361 U. S. 529 (1960) wherein this Court granted a government motion to vacate the lower court judgment and remand for dismissal based upon the "formulation and implementation of enlightened and proper prosecutorial policy." Defendant's Brief on Motion to Vacate and Dismiss, p. 3; and Redmond v. United States, 384 U. S. 264 (1966), wherein this Court again granted a government motion to vacate and dismiss based upon a Departmental policy of non-prosecution of obscenity statute violators, and the policy to act only against "strategic cases." Respondents Brief for Certiorari, pp. 3-4.

42. United States v. Brokaw, *id.*, and the case cited therein.

43. Hutcherson v. United States, 345 F. 2d 964 (D. C. Cir. 1965); *cert. denied*, 382 U. S. 894 (1965); Peek v. Mitchell, 419 F. 2d 575 (6th Cir. 1970); Newman v. United States, 382 F. 2d 479 (D. C. Cir. 1967); Powell v. Katzenbach, 359 F. 2d 234 (D. C. Cir. 1965); *cert. denied*, 384 U. S. 906 (1966); Clemone v. United States, 137 F. 2d 302 (4th Cir. 1943); Deutsch v. Aderhald, 80 F. 2d 677 (5th Cir. 1935).

44. See Pugach v. Klein, *supra* note 26; United States v. Brokaw, *supra*, note 28; Petite v. United States, *supra*, note 27.5; Redmond v. United States, *supra*, note 2715; Even where courts or statutes have required reasons for absence of prosecution or for nolle pros, the resulting judicial review in a mandamus proceeding has been a mere "formality". Comment, *Private Prosecution: A Remedy for District Attorneys Unwarranted Inaction*, 65 YALE L. J. 209, 213 (1955).

3 of the Constitution of the United States provides that "[the President] shall take care that the laws [shall] be faithfully executed." Accordingly the federal courts have always held that "The prerogative of enforcing the criminal laws was vested by the Constitution therefore, not in the Courts, nor in private citizens, but squarely in the executive arm of the government."[45] As early as *Marbury v. Madison,* [46] Mr. Chief Justice Marshall established the pattern for the relationship between the judicial and executive branches of government:

> . . . Where the head of a [executive] department acts in a case in which *executive discretion* is to be exercised . . . it is again repeated that any application to a court to *control,* in any respect, his conduct would be rejected without *hesitation.*[47] (Emphasis added.)

In the *Confiscation Cases,* this Court held that: "Public prosecutions are within the exclusive direction of the district attorney, and, even after they are entered in court, they are so far under his control that he may enter a *nolle prosequi* at any time before the jury is impaneled for the trial of the case.[48] Later cases, while all relying upon the separation of powers doctrine, have cited an equally important reason for refusing to interfere with the prosecutor. In *Pugach* v. *Klein,* the court recognized the delicate nature of the decision to prosecute:

> Surely it is for the United States Attorney to decide whether the public interest is better served by prosecuting or declining to prosecute . . . the likelihood of conviction . . . the degree of criminality, the weight of the evidence, the credibility of witnesses, precedent,

45. Pugach v. Klein, 193 F. Supp. 630, at 634 (S. D. N. Y. 1961).

46. 1 Cranch 137 (1808); See also Goldberg v. Hoffman, 225 F. 2d 463 (7th Cir. 1955).

47. *Id.,* at pages 170-171.

48. 7 Wall. 454, 19 L. Ed. 196 (1893).

> **policy, the climate of public opinion, timing, gravity of the offense . . .**
>
> **Still other factors are the relative importance of the offense compared with competing demands of other cases on the time and resources of investigation, prosecution and trial. All of these numerous other intangible and unponderable factors must be carefully weighed and considered by the United States Attorney in deciding whether or not to prosecute.**
>
> **All of these considerations point up the wisdom of vesting broad discretion in the United States Attorney. The federal courts are powerless to interfere with his discretionary power. The Court cannot compel him to prosecute a complaint or even an indictment, whatever his reasons for not acting. The remedy for dereliction of his duty lies, not with the courts, but, with the executive branch of our government and ultimately with the people.''**[49]

In *United States* v. *Cox*, the Fifth Circuit recognized that: "The executive's absolute and exclusive discretion to prosecute may be rationalized as an illustration of the doctrine of separation of powers, but it would have evolved without the doctrine and exists in countries that do not purport to accept this doctrine."[50]

The courts have carefuly preserved prosecutorial discretion even in cases where the prosecutor's *conduct* in a particular case is reviewed by the courts. Certainly a prosecutor's *conduct* in a given case has been and is subject to control by the courts. When a prosecutor withholds favorable evidence to the defense,[51] or refuses to disclose the

49. *Supra*, note 45, at 635; Later cases have strictly adhered to this view. See Moses v. Kennedy, 219 F. Supp. 762 (D. D. C. 1963); Powell v. Katzenbach, 359 F. 2d 235 (D. C. Cir. 1965) *cert. denied*, 88 S. Ct. 1341.

50. 342 F. 2d 167 (5th Cir. 1965), *cert. denied*, 85 S. Ct. 1767.

51. Brady v. Maryland, 373 U. S. 83 (1962); Giles v. Maryland, 386 U. S. 66 (1967); Miller v. Pate, 386 U. S. 1 (1967).

content of government wiretaps,[52] or engages in misconduct at trial to the prejudice of a particular defendant, his case against such defendant is dismissed or reversed on appeal. Similarly, courts are willing under certain limited circumstances, to prohibit the prosecutor, by way of injunction, from *instituting* criminal proceedings against an irreparably injured or prejudiced defendant.[53] Such prohibitory relief is in the nature of accelerated appellate review. Such review of prosecutorial misconduct or prohibitory relief, however, is not directed toward the prosecutor's discretion, but only toward his particular conduct prejudicial to a particular defendant either before or about to be brought before the court. While particular cases may be dismissed or reversed, the courts have been careful to always preserve prosecutorial discretion. The prosecutor always retains his discretion and power to refuse disclosure or engage in misconduct though his case may be dismissed or reversed as a consequence. The prosecutor's discretion is never reviewed nor divested by the courts, even though the courts may prohibit his goal—successful prosecution—as a consequence of his prejudicial action. The Court which reviews the prosecutor's conduct in these contexts does not involve a right of direct control over the prosecutor. Rather the court reviews the conduct of the courtroom or judicial process. It is the action of the trial court, not of the prosecutor that is the basic subject of review. As Chief Justice Burger recognized in *Newman* v. *United States*

> [The prosecutor] is at once an officer of the court and the attorney for a client; in the first capacity he is responsible to the Court for the *manner of his conduct of a case*, . . . but in the second capacity, as agent and attorney for the Executive, he is responsible to his

52. See Alderman v. United States, 394 U. S. 165, 89 S. Ct. 961 (1969).

53. Ex Parte Young, 209 U. S. 123 (1908); Younger v. Harris, 401 U. S. 37 (1971).

> principal and the courts have *no power over the exercise of his discretion* or his motives as they relate to the execution of his duty within the framework of his professional employment . . . The concurring opinion would reserve judicial power to review "irrational" decisions of the prosecutor. We do our assigned task of appellate review best if we stay within our own limits, recognizing that we are neither omnipotent so as to have our mandates run without limit nor omniscient so as to be able to direct all branches of government. The Constitution places on the Executive the duty to see that the "laws are faithfully executed" and the responsibility must reside with that power.[54]. (Emphasis added.)

And as succinctly stated by the Seventh Circuit in *Goldberg* v. *Hoffman*, "Discretion is always subject to abuse, but the framers of our constitution have indicated their conviction that the danger of abuse by the executive is a lesser evil than to render the acts left to executive control subject to judicial encroachment."[55]

The attitude of the courts in preserving prosecutorial discretion is well supported by the policy considerations which, in part, underlie the separation of powers doctrine. As stated in *United States* v. *Cox*, "The functions of prosecutor and judge are incompatible."[56] The prosecutor, functioning as an elected law enforcement officer and advocate for the public interest, must not only be a skilled courtroom advocate, but shrewd investigator, an efficient administrator, and a perceptive judge of the public interest he represents. To weigh competently the innumerable factors to be considered in the decision to prosecute he must have knowledge of and experience with the police, investigators, victims, defendants and witnesses as well as

54. 382 F. 2d 479, at 481, 482 n. 9 (D. C. Cir. 1967).

55. 225 F. 2d 463, 466 (7th Cir. 1955).

56. 342 F. 2d 167, 192 (5th Cir. 1965), *cert. denied*, ____ U. S. ____, 85 S. Ct. 1767.

with the courts, juries, and correctional policy and practices. Without such knowledge, experience and expertise, the public interest is compromised. The judge, functioning as "umpire" in the adversary system, has as his primary duty the interpretation and proper application of the law. While a judge may, in some cases, have general knowledge of prosecutorial policies and procedures, nothing in his judicial knowledge or experience renders him competent to weigh the factors inherent in the decision to prosecute. And his lack of "on-the-scene" participation in the basic investigation, his remoteness (in many cases) from the community and its police agencies are factors which will render him incapable of exercising a sound prosecutorial discretion. Moreover, the judge has a basic responsibility to remain neutral in the adversary process. Participation by the judge in a decision to prosecute would destroy his neutrality.[57]

The Seventh Circuit failed to consider the role of the prosecutor, the nature of and need for prosecutorial discretion, or the respect for such repeatedly asserted by the courts. Apparently the Court reasoned that either the Civil Rights Act abrogated prosecutorial immunity from the type of injunction authorized, or that the state prosecutor, in the exercise of his executive discretion, did not have the immunity from control by the federal judiciary traditionally enjoyed by the federal prosecutor.[58]

It is well established however, that the Civil Rights Acts did not abrogate the common law immunities of public

57. Consider the questions raised in Petitioner's Petition for Certiorari, p. 14.

58. The Circuit Court's repeated reference to the holding by this Court in Mitchum v. Foster, *supra*, note 1, both of these theories.

officials.[59] Moreover, as recognized in *Moses* v. *Kennedy*,[60] nothing in the legislative history of the Civil Rights Act indicates that the judiciary is to have the power to force a discretionary executive act. In *Hampton* v. *City of Chicago, Cook County, Illinois*[61] the court specifically held that the common law immunity of the States Attorney was not abrogated by the enactment of the Civil Rights Act.

Like the United States Constitution, the Illinois Constitution of 1970 divides state government into the legislative, executive and judicial branches. Article II, Section 1 specifically provides that: "The legislative, executive, and judicial branches are separate. No branch shall exercise powers properly belonging to another." Article V Section 8 provides that: "The Governor shall have the supreme executive power, and be responsible for the faithful execution of the laws." In Illinois, as in all other states, the State's Attorney is considered a member of the executive branch of government, and the powers exercised by him are executive powers. Accordingly, state courts have re-

59. In Tenney v. Brandhove, 341 U. S. 367 (1951); this Court held that the Civil Rights Act did not abrogate legislative immunity. On the basis of Bradley v. Fisher, 80 U. S. (13 Wall.) 335 (1872), and Tenney, lower courts have repeatedly held that both judicial (judges) and quasi-judicial (prosecutors) immunity remains viable under the Civil Rights Acts. Bauers v. Heisel, 361 F. 2d 581 (3rd Cir. 1966); Sires v. Cole, 320 F. 2d 877 (9th Cir. 1963); Robichaud v. Ronan, 203 F. 2d 533 (9th Cir. 1965); Fanale v. Sheehy, 385 F. 2d 866 (2nd Cir. 1967); Dacy v. New York County Lawyers Association, 423 F. 2d 188 (2nd Cir. 1969) *cert. denied*, 398 U. S. 929 (1970); United States ex rel. Rauch v. Deutsch, 465 F. 2d 130 (3rd Cir. 1972); Kostal v. Stoner, 292 F. 2d 492 (10th Cir. 1961), *cert. denied*, 369 U. S. 868 (1962); Kenny v. Fox, 232 F. 2d 288 (6th Cir. 1955), *cert. denied*, 352 U. S. 855 (1956); Eaton v. Bibb, 217 F. 2d 446 (7th Cir. 1954), *cert. denied*, 350 U. S. 915 (1955); Hampton v. City of Chicago, Cook County, Illinois, 339 F. Supp. 695 (D. C. Ill. 1972).

60. 219 F. Supp. 762 (D. D. C. 1963).

61. *Supra*, note 59; See also Arensman v. Brown, 430 F. 2d 190 (7th Cir. 1970).

fused to interfere with the discretionary decisions of the prosecutor.[62]

The rationale and policy underlying prosecutorial immunity for the federal prosecutor clearly dictates that equal immunity from federal court review and control be granted the state prosecutor. It is clear that the state prosecutor is in the same role in the criminal justice system as is the federal prosecutor, they simply prosecute different offenses. As prosecutors, both exercise the same type of executive discretion. The rationale and underlying policy asserted by the federal courts for immunizing the federal prosecutor from judicial control is the same rationale and underlying policy asserted by state courts for immunizing the state prosecutor. Given identical roles and equivalent executive discretion which is respected by courts for identical reasons, state and federal prosecutors should be equally immune from judicial control by any court. It is obvious that the discretion exercised by a state prosecutor would be as adversely affected by review and control by a federal court, as it would be by review and control by a state court. It is equally obvious that a federal judge is no more competent to make prosecutorial decisions, nor any more able to remain neutral after exercising prosecutorial discretion than is a state court judge. The executive discretion exercised by a prosecutor, whether he be a state or federal prosecutor, should not be reviewed or controlled by either state or federal courts.

The Seventh Circuit, for the first time in the history of American criminal jurisprudence, authorized an injunction to be issued by the federal court which would compel a state prosecutor to prosecute. Such an injunction would *divest* the state prosecutor of discretion which only he has exercised in the past.

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62. People v. Baron, 130 Ill. App. 2d 588, 264 N. E. 2d 423; People ex rel. Elliot v. Covelli, 415 Ill. 79, 112 N. E. 2d 156 (1953); see the state cases cited in note 39.

In *Younger* v. *Harris*, this Court spoke to the notion of "'comity', that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate ways." This Court recognized that this concept represents "a system in which there is sensitivity to the legitimate interests of both State and National Governments, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."[63] This Court has often recognized that it is of the "very essence of our federalism that the States should have the widest latitude in the administration of criminal justice."[64]

In *Fenner* v. *Boykin*, this Court stated that "Ordinarily, there should be no interference with [state prosecutors]; primarily, they are charged with the duty of prosecuting offenders against the laws of the state, *and must decide when and how* this is to be done. The accused should first set up and rely upon his defense in the state courts . . ."[65] While *Younger* authorized, under very limited circumstances, injunctive relief against state criminal prosecution, the Seventh Circuit has now authorized injunctive relief to compel state prosecution. Petitioner submits that nothing would be more harmful, more disruptive, or cause more friction in the federal-state relationship, than for this

63. 401 U. S. 37, 91 S. Ct. 750 (1971).

64. Haag v. State of New Jersey, 356 U. S. 464, 78 S. Ct. 829 (1958); Cicenia v. La Gay, 357 U. S. 504, 78 S. Ct. 1297; Knapp v. Schweitzer, 357 U. S. 371; 78 S. Ct. 1302 (1958); See also: Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111 (1884); Twining v. State of New Jersey, 211 U. S. 78, 29 S. Ct. 14 (1908).

65. 271 U. S. 240, at 243-244, 46 S. Ct. 492, at 493 (1926).

Court to allow federal courts to review and control necessarily discretionary decisions of state prosecutors.

Aside from the notion of "Our Federalism," the role of the prosecutor in the criminal justice system, the nature of and need for prosecutorial discretion, and the need for such discretion to remain free from judicial control dictates that the state prosecutor continue to remain immune from an injunction compelling him to prosecute.

III.

RESPONDENTS HAVE AVAILABLE CIVIL REMEDIES AND ACCESS TO CRIMINAL PROCESS AT LAW WHICH ARE AS ADEQUATE AND MORE PREFERABLE TO THE UNDULY BURDENSOME INJUNCTION AGAINST THE STATE PROSECUTOR.

The Seventh Circuit held that "This is not a case in which it can be said that there is an adequate remedy at law and therefore there is proper basis for equitable relief . . . We . . . would retund credulity to say that a private action (for damages) is the equivalent of prompt and effective prosecution under the criminal laws . . . While, in some instances, the private damage action may have deterring effects, it seems unlikely it will obviate the necessity for a system of criminal justice."[66] The Court found other remedies either unavailable or inadequate, *e.g.* political remedies, criminal prosecution for official misconduct, private enforcement of criminal law. Lastly, the Court held that the "injunctive remedy proposed by plaintiffs . . . must be found preferable to holding that the criminal laws cannot be enforced against blacks who assault whites so long as whites are not being punished for assaults on blacks."[67]

66. Littleton v. Berbling, 468 F. 2d 389, 412 (1972).

67. *Id.*, pp. 38-39.

Respondents' numerous alternative remedies are as adequate and infinitely preferable to compelling the state prosecutor to prosecute. Both the prosecutor and the individuals he declined to prosecute may be subject to criminal liability in the federal courts for violation of respondents' civil rights.[68] No remedy is more effective against the prosecutor, for if convicted of violating plaintiffs' civil rights, the prosecutor will be automatically removed from office under Illinois law.[69]

In both state and federal courts, respondents have an action for damages against the alleged assailants who the prosecutor declined to prosecute.[70] Clearly these remedies are preferable to compelling the state prosecutor, against his judgment, to prosecute these alleged assailants in state courts.

Indeed, even the remedies the Circuit Court prohibited or deemed "less preferable" are infinitely more preferable to the remedy it authorized. Subjecting the prosecutor to liability for damages would at least confine the action to a particular dispute between the parties and not require supervision of the prosecutor. The injunction authorized,

68. 18 U. S. C. §§ 241, 242 provide adequate federal *criminal* remedies against persons acting under color of state law or individuals conspiring to deprive persons of their constitutional rights. Additionally, on the State level, the Illinois Attorney General is authorized by statute to "undertake necessary enforcement measures" for the prevention of discrimination against persons by reason of race, color, or creed. Chapt. 14, Section 9, Illinois Revised Statutes (1971). See also Doe v. Scott, 321 F. Supp. 1385 (N. D. Ill. 1971), and consider the exhaustion issue raised in the Amicus Curie Brief of Evelle J. Younger, Attorney General of the State of California, p. 11.

69. See Ill. Rev. Stat. Ch. 38, Sec. 124-2; Ill. Rev. Stat. Ch. 38, Sec. 1005-5-5 (eff. January 1, 1973); Illinois Constitution, Article XIII, Sec. 1; People ex rel. Keenen v. McGuone, 13 Ill. 2d 520, 150 N. E. 2d 168 (1958).

70. 42 U. S. C. 1985(3) and available tort remedies in state courts provide adequate civil remedies.

however, would require the federal judiciary to assume the role of the state prosecutor and subject potentially innocent third parties to federally forced state prosecution. Clearly damages are preferable to a wholesale dislocation of the historic relationship between the state and federal courts in the administration of the criminal law.

In *Yick Yo* v. *Hopkins*,[71] this Court refused to uphold a misdemeanor conviction under a municipal ordinance after a finding of discriminatory enforcement against persons of Chinese ancestry. The defense of discriminatory enforcement, assertable by persons against whom a statute is sought to be enforced, was impliedly recognized by this Court in *Ah Sin* v. *Wittman*,[72] *Edelman* v. *California*,[73] and *Oyler* v. *Boles*.[74] If there be a right to nondiscriminatory enforcement of state penal law,[75] the *Yick Yo* defense remedy is clearly preferable to an injunction compelling state prosecution. As opposed to such injunction, the *Yick Yo* remedy would preserve the necessary discretion of the state prosecutor, be less disruptive to the federal-state relationship and be potentially more effective in securing even-handed prosecution.[76]

Notwithstanding respondents' alternative legal remedies, the Seventh Circuit preferred to authorize a remedy that would clearly unduly burden both the state prosecutor and

71. 118 U. S. 356, 6 S. Ct. 1064 (1886).

72. 198 U. S. 500, 508 (1905).

73. 344 U. S. 357, 359 (1953). See brief for petitioner, pp. 6, 14-16; Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 Col. L. Rev. 1103 (1961).

74. 368 U. S. 448, 82 S. Ct. 501 (1962).

75. Many courts deny Yick Yo applicability to discriminatory penal enforcement. See Buxbom v. City of Riverside, 29 F. Supp. 3 (S. D. Cal. 1939); Sanders v. Lowrey, 58 F. 2d 158 (5th Cir. 1932); Jackie Cab Co. v. Chicago Park Dist., 366 Ill. 474, 9 N. E. 2d 213 (1937); See Comment, *id.*, at 1106.

76. It is suggested that nothing will secure non-discriminatory prosecution faster than subjecting those favored by discrimination to the experience of those disfavored.

the district court. The state prosecutor must first comply with extensive discovery procedure and defend himself in all the hearings pursuant to the desired initial decree. If the decree be issued as envisioned by the Seventh Circuit, he must then periodically report to the district court all of his previously discretionary decisions within the scope of the decree. After endless pleadings, discovery procedures and hearings in the district court as these decisions are challenged and reviewed, the prosecutor must then take whatever further action the district court desires—which again will be reviewed and the entire process repeated. Moreover, since this remedy is available, invariably other "classes" of angry citizens (*e.g.* Latins, college students, store owners, rape victims, etc.) will bring action for a similar injunction. Ultimately the state prosecutor will need a branch office at the district court solely to defend his discretionary decisions.

For the district court the burden will be even greater. Aside from the original pleadings, hearings, and orders, the initial decree, as envisioned by the Seventh Circuit, will breed an even greater number of "review" hearings, throughout which the district court judge must himself assume the role of the state prosecutor. While these hearings proceed, the district court can expect to be repeatedly challenged for its prosecutorial decisions and the actions it forces the prosecutor to take.

One can easily foresee the intense difficulties a district court will encounter. Will a potential defendant stand mute when some angry "class" of citizens is demanding his prosecution in federal court? The court may, for example, order a state prosecutor to proceed on given case because its court thinks there is enough to go to a jury. If the same kind of evidence is presented in a federal prosecution, will the court be able to hear the defendant's motion for a directed verdict with a clear, uncommitted mind? If

the court orders a state prosecutor to adopt certain practices to insure that certain cases will be well prosecuted, what posture will the court take if a convicted state court defendant challenges those practices in a federal habeas corpus proceeding? Will the state court defendant have the right to question sufficiency of evidence in state court when the federal court has already ruled on the issue? Will the state court defendant be able to argue to the jury that he is being prosecuted by order to the federal court? Will the federal court be able to inquire of grand jurors as to why they refused to indict upon a charge that the federal court has order brought? Will the federal court exercise the same control over the state grand jury that it does over the prosecutor? If the prosecutor refuses to obey a court order as to an individual case, accepts a contempt citation and appeals it, will the state statute of limitations be tolled while the appeal is being decided without violating the state court defendant's rights? What remedy will a state court defendant have if he is charged and put to trial and a federal appeals court later decides that the state prosecutor could properly have declined to proceed? Will the potential state court defendant have the right to intervene in the federal proceeding challenging the prosecutor's refusal to prosecute him? Will the federal court have to consider questions of admissibility of confessions, physical and identification evidence in determining whether a given case is a proper one on which to proceed? If the court does so what effect will its rulings have in state trial courts, on state appeal, on federal habeas corpus?

The Circuit Court considered none of these problems (and the list is not exhaustive)—it resolved the question in terms of its faith that the district court could somehow find its way through to a solution. The petitioner suggests that these problems cannot be fully solved. Even the attempt to solve them will open floodgates of pointless futile litigation.

B.

While the Seventh Circuit recognized that in Civil Rights Act cases highly specific factual averments are required to defeat a motion to dismiss (otherwise "every complaint against a State official by the simple expedient of averring conclusions would be cognizable in the federal courts."[77]), the Court found it "preferable that dismissal should be sparingly used whenever it appears that a basis for federal jurisdiction in fact exists or may exist and can be stated by plaintiff."[78] The Court later noted, however, that this was a case of "first impression as to the type of relief approved,"[79] that ". . . a prosecutor's time is necessarily limited . . .,"[80] and that there was "the possibility of substantial additional burden being placed on the federal judiciary by our decision."[81] Additionally, the Court seemed to recognize that the invidious discrimination alleged by respondents would be a difficult proposition for the respondents to prove.[82]

As against petitioner, the Courts permissive attitude toward respondents' complaint was improper for the following reason.

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77. United States ex rel. Hoge v. Bolsinger, 211 F. Supp. 199, 201 (W. D. Pa. 1962), aff'd., 311 F. 2d 215 (3rd Cir. 1962), *cert. denied*, 372 U. S. 931 (1963).

78. Littleton v. Berbling, *supra*, note 66, at 394.

79. *Id.*, at 414.

80. *Id.*, at 413.

81. *Id.*, at 415.

82. *Id.*, at 408, 414.

IV.

THE CONCLUSORY COMPLAINT DRAFTED BY ATTORNEYS IS INSUFFICIENT TO STATE A CAUSE OF ACTION AGAINST A STATE PROSECUTOR IN VIEW OF THE ABUSE POTENTIAL INHERENT IN SUCH SUITS AND THE VERY MINIMAL POSSIBILITY OF PLAINTIFFS PREVAILING.

Respondent's complaint, drafted by lawyers, alleges that the defendant state's attorney ". . . willfully and with intent to deprive plaintiff and members of their class of the benefits of the criminal justice system in Alexander County . . ." a) refuses to initiate criminal proceedings against Whites upon complaints filed by Blacks (6 examples cited); b) submits complaints filed by Blacks to a grand jury rather that proceeding by information, and then interrogates Black complainants before the grand jury with an intent to discriminate (1 example cited); c) fails to interrogate Black complainants and key witnesses before the grand jury with intent to discriminate (2 examples cited); d) inadequately prosecutes complaints filed by Blacks (no examples cited); files more serious charges against Blacks (no examples cited); requests or recommends greater bonds and sentences against Blacks (no examples cited); seeks to drop charges against Whites (1 example cited).[83]

The Seventh Circuit was satisfied that respondents complaint sufficiently alleged that the State's Attorney "handles complaints and prosecutes cases in a blatently discriminatory and arbitrary manner."[84] It is clear that the Court relied solely upon respondents' conclusory allegations, for the supporting factual examples cited by respondents are blatently insufficient to indicate any discrimination whatso-

83. Amended Complaint, par. 14 (Appendix p. 19).

84. Littleton v. Berbling, *supra*, note 66, at 411-412.

ever on the part of the State's Attorney. No examples were cited which demonstrates that the prosecution brought or was willing to bring charges against Blacks supported by the same quantum of evidence presented by White complainants. No examples were cited which in any way indicates that the prosecutor prosecuted cases involving White complainants any differently than those involving Black complainants. There are no facts pleaded which give rise to an inference of *intentional and systematic discrimination* by the state prosecutor, only facts which indicate the prosecutor refused to proceed or took certain actions on a few complaints filed by Blacks.

Conclusory allegations, unsupported by facts, have consistently been rejected as insufficient to constitute a cause of action under the Civil Rights Act.[85] Respondents failure to support factually their allegation of discrimination renders the complaint insufficient to state a cause of action against petitioner.

The policy for requiring factual support of conclusory allegations in complaints under the Civil Rights Act is well reasoned. An overly permissive attitude toward suits under the Civil Rights Act would place a heavy burden on public officials as well as subject them to abuse. Additionally and especially in suits alleging intentional discrimination, the requirements of proof are often difficult to meet. It would

85. A similarly conclusory petition was held insufficient to justify federal action in Greenwood v. Peacock, 384 U. S. 808 (1966); se also Marin v. Pinto, 463 F. 2d 583 (3rd Cir. 1972); Kauffman v. Moss, 420 F. 2d 1270 (3rd Cir. 1970) *cert. denied* 400 U. S. 846, 91 S. Ct. (1970); United States ex rel. Hoge v. Bolsinger, 311 F. 2d 215 (3rd Cir. 1962) *cert. denied* 372 U. S. 931, 83 S. Ct. 878 (1963); Ortega v. Regen, 216 F. 2d 561 (7th Cir. 1954) *cert. denied* 349 U. S. 940, 75 S. Ct. 786 (1955); Hoffman v. Halden, 268 F. 2d 280 (9th Cir. 1959); Powell v. Workman's Compensation Board of New York, 327 F. 2d 132 (2nd Cir. 1964); Johnson v. Mueller, 415 F. 2d 354 (4th Cir. 1969); Lamar v. 118th Judicial District of Texas, 440 F. 2d 383 (5th Cir. 1971); Jensen v. Olson, 353 F. 2d 825 (8th Cir. 1965).

be unwise for the courts to allow a suit to proceed without some indication that plaintiffs can prevail at trial.

The potential burden on state prosecutors and the federal courts arising from the present suit is awesome (See Argument III). The abuse potential of such suits is also great. Respondents brought a class action. While the Seventh Circuit held that "the number of suits charging discrimination against classes of citizens is not predictably substantial . . .",[86] the Court ignored the fact that class actions may be filed by innumerable civic groups seeking to compel prosecution of certain classes of offenses which they claim are being inadequately prosecuted for improper motives. Those who oppose abortion or pornography could file such suits where the prosecutor fails to act vigorously enough to please them. The criminal laws affecting landlords and their tenants many not be enforced consistently enough or well enough to suit either group and both may bring their complaints to a federal court and ask it to regulate state prosecution. Environmentalists and the industrialists will want to litigate prosecution policy in a similar fashion. The list of real or imagined grievances that a class of citizens may have against a local prosecutor for failure to bring certain charges or to prosecute them adequately is endless. And it is never difficult to allege that the prosecutor's motives are based upon racial, religious or political prejudice.[87] Lastly, considering the requirements of proof

86. Littleton v. Berbling, *supra*, note 66, at 413.

87. A permissive attitude toward development of suits like these will inevitably embroil the District Court in local political disputes to a degree we think is unacceptable. It would not be difficult for the supporters of a challenger for the prosecutor's office to file an adequate complaint and use the litigation process to harass and attack the incumbent. Each ruling of the District Court for either side during the campaign would assume substantial political significance.

that this Court[88] and lower courts[89] have established in cases alleging discriminatory enforcement of laws, it is highly improbable that respondents would prevail at trial.

Petitioner submits that the potential for undue burden and abuse inherent in the present suit, and the improbability of respondents prevailing at trial requires that the conclusory, unsupported allegations in respondent's complaint be deemed insufficient to state a cause of action against the state prosecutor.

88. Oyler v. Boles, 368 U. S. 448, 82 S. Ct. 501 (1962); Edelman v. People of the State of California, 344 U. S. 356, 73 S. Ct. 293 (1953) (dictum); Ah Sin v. Wittman, 198 U. S. 500, 506-507, 25 S. Ct. 756 (1905); Snowden v. Hughes, 321 U. S. 1, 8, 64 S. Ct. 397, 401 (1944); MacFarland v. American Sugar Refining Co., 241 U. S. 79, 86-87, 39 S. Ct. 498; Yick Yo v. Hopkins, 118 U. S. 356, 373-374, 6 S. Ct. 1064 (1886); Torrence v. State of Florida, 188 U. S. 519, 520, 23 S. Ct. 633 (....); Grundling v. City of Chicago, 177 U. S. 183, 186, 20 S. Ct. 633, 635 (1900).

89. Boynton v. Fox W. Coast Theatres Corp., 60 F. 2d 851 (10th Cir. 1932); see generally Comment, *The Right to Non-Discriminatory Enforcement of State Penal Laws*, 61 Colum. L. Rev. 1103, 1122-31 (1961).

CONCLUSION.

For the reasons given above, Petitioner urges this court to reverse the decision of the United States Court of Appeals for the Seventh Circuit, and affirm the decision of the United States District Court for the Eastern District of Illinois.

Respectfully submitted,

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